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BEFORE THE ARIZONA CORPORATION COMMISSION

2010 SEP 17 P 2:51

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

AZ CORP COMMISSION
DOCKET CONTROL

In the matter of:

THEODORE J. HOGAN & ASSOCIATES, LLC
a.k.a. TED HOGAN AND ASSOCIATES, an
Arizona limited liability company,

THEODORE J. HOGAN a.k.a. TED KILLS IN
THE FOG, a married man

and

CHRISTINA L. DAMITIO a.k.a. CHRISTINA
HOGAN, a married woman,

Respondents.

DOCKET NO. S-20714A-09-0553

SECURITIES DIVISION'S POST
HEARING BRIEF

Arizona Corporation Commission
DOCKETED

SEP 17 2010



The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its post-hearing brief as follows:

I. PROCEDURAL HISTORY

On December 8, 2009, the Division filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties and for Other Affirmative Action ("Notice"). The Notice alleged that Respondents THEODORE J. HOGAN & ASSOCIATES, LLC, a.k.a. TED HOGAN AND ASSOCIATES ("HOGAN & ASSOCIATES") and THEODORE J. HOGAN a.k.a. TED KILLS IN THE FOG ("HOGAN"), engaged in acts, practices and transactions that constituted violations of the Securities Act of Arizona ("Act"), A.R.S. §§44-1841, 44-1842 and 44-1991. HOGAN & ASSOCIATES and HOGAN may be collectively referred to as "Respondents." CHRISTINA L. DAMITIO a.k.a.

1 CHRISTINA HOGAN ("DAMITIO"), indirectly violated A.R.S. § 44-1991, as a control person of
2 HOGAN & ASSOCIATES pursuant to A.R.S. § 44-1999.

3 On December 9, 2009, the Division served the HOGAN & ASSOCIATES, HOGAN and
4 DAMITIO the Notice via express mail.

5 On December 22, 2009, HOGAN & ASSOCIATES, HOGAN and DAMITIO filed a
6 Request for Hearing. **(Pre-hearing conference transcript "P.H.T" dated January 28, 2010 p.
7 4:19 – p. 8:25).**

8 Pursuant to the Procedural Order dated February 1, 2010, Administrative Law Judge
9 ("ALJ") Stern set a hearing on this matter to begin on June 15, 2010.

10 The hearing began on June 15, 2010. The hearing was continued to June 21, 2010, due to
11 conflicts in schedules. The ALJ admitted Division Exhibits S-1 – S-21 and S-23¹ into evidence.
12 **(Hearing Transcript "H.T." p. 88:15 - 24)(H.T. p. 41:3 - 25)(H.T. p. 47:11 – p. 48:4)(H.T. p.
13 53:10 – 18)(H.T. p. 75:21 – p. 76:3)(H.T. p. 104:24 – p. 105:24)(H.T. p. 105:25 – p.
14 106:10)(H.T. p. 106:11 – p. 107:4)(H.T. p. 131:2 –10) (H.T. p. 106:11 – p. 107:4)(H.T. p.
15 155:11 – 23).**

16 II. STANDARD OF PROOF

17 In administrative actions brought by the Commission, the well-recognized standard of
18 proof for alleged violations of the Act is the "preponderance of the evidence." *See, e.g., Steadman*
19 *v. Securities and Exchange Commission*, 450 U.S. 91 (1981) (Securities and Exchange
20 Commission properly applied the 'preponderance of the evidence' standard when determining
21 administrative proceeding); *Geer v. Ordway*, 156 Ariz. 588, 589, 754 P.2d 315, 316 (App. 1987)
22 (in context of administrative hearing, proper standard of proof is preponderance of the evidence).
23 Therefore, the preponderance of the evidence standard is applicable in this matter.

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26 ¹ The Division withdrew Exhibit S-22.

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III. JURISDICTION

The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and the Act.

IV. FACTS

HOGAN and DAMITIO resided in and operated HOGAN & ASSOCIATES from Sedona, Arizona. **(Affidavits of Service docketed on December 15, 2009)(H.T. p. 63:9 - 12).** HOGAN & ASSOCIATES held business bank accounts at banks located in Sedona, Arizona. **(Exhibits S-16 and S-24).**

HOGAN & ASSOCIATES is an Arizona limited liability company with its principal place of business in Sedona, Arizona. **(H.T. p. 86:1 - 7)(Exhibit S-1).** HOGAN & ASSOCIATES is a member-managed limited liability company. **(H.T. p.92:13 - 16)(Exhibit S-1).** On August 5, 2002, at the first meeting of the members of HOGAN & ASSOCIATES, the members were listed as HOGAN as "Chairman pro tem" and HOGAN's daughter as "Secretary pro tem." **(Exhibits S-17 ACC001744 and S-21).** The members voted HOGAN as "Managing Member" and "Chief Executive Officer." **(Exhibits S-17 ACC001744-45 and S-21).** At the same meeting, the members voted DAMITIO as "Vice-Managing Member." **(H.T. p.92:17 - 20)(Exhibits S-17 ACC001744-45 and S-21).**

Beginning in 2001, HOGAN & ASSOCIATES and/or HOGAN entered into Interest in a Commissions Agreements ("Agreements") with investors. **(Exhibits S-5 - S-13).** According to the Agreements, HOGAN was to receive compensation under a consulting agreement with the Crow Tribe. **(Exhibits S-5 - S-13).** In return for the investments, the investors were to receive a portion of HOGAN's compensation within six months to one year. **(Exhibits S-5 - S-13).**

The Agreements described HOGAN & ASSOCIATES and HOGAN as "coordinating a significant financial undertaking for the mineral exploration and development of resources (Project) on the Crow Indian Reservation . . . between the Crow Tribe . . . and one or more energy companies." **(Exhibits S-5 - S-13).** HOGAN was to earn "as much as . . . \$360,000,000 over the

1 next six months to one year” for “commissions, consulting fees, royalties, and like compensation
2 for his activities.” (Exhibits S-5 - S-13). The investors were to provide HOGAN & ASSOCIATES
3 and/or HOGAN with the funds necessary for the “mineral exploration and development of
4 resources . . . on the Crow Indian Reservation.” (Exhibits S-5 - S-13). The return was based on a
5 percentage or share of the “commissions, consulting fees, royalties and like compensation for his
6 activities” that HOGAN expected to earn from the Crow Tribe. (Exhibits S-5 - S-13 and S-23).
7 The investors were to receive a return on their investments within six months to a year after the
8 investments. (Exhibits S-5 - S-13).

9 Some of the Agreements state that the “[i]nvestor shall not have any interest or ownership
10 in Hogan and Associates, nor shall the [i]nvestor participate in the management of Hogan and
11 Associates.” (H.T. p.32:1 – 4)(H.T. p. 130:20 – p. 131:1)(Exhibits S-6, S-7, S-8 and S-9). The
12 investors were only required to provide investment funds to HOGAN & ASSOCIATES and
13 HOGAN. (H.T. p. 65:21 – p. 66:1)(H.T. p. 131:16 – 19)(Exhibits S-5 - S-13).

14 The Agreements with the investors were essentially the same; however, the amount of
15 return expected by each investor differed. HOGAN & ASSOCIATES and HOGAN promised to pay
16 some investors ten times the amount invested. (H.T. p. 35:11 – 1)(H.T. p. 40:6 – 7)(Exhibits S-9
17 and S-13). In another instance, the investor was told he would receive fifteen times the dollar amount
18 invested from HOGAN & ASSOCIATES and HOGAN. (H.T. p. 125:8 – 12)(Exhibit S-8). In yet
19 another instance, investors were told they would earn five times the amount invested from HOGAN &
20 ASSOCIATES and HOGAN. (H.T. p. 36:13 – 14)(H.T. p. 37:23 – 24)(Exhibits S-11 and S-12).
21 Finally, one investor was to receive five percent of all the commissions earned by HOGAN &
22 ASSOCIATES and HOGAN. (H.T. p. 91:10 – 18)(Exhibit S-10).

23 In addition to different returns on their investments, investors received Agreements
24 pursuant to which the proceeds were to be used for different purposes. Most of the investors
25 received Agreements that said funds would be used to facilitate some energy project on the Crow
26 Reservation. (Exhibits S-6 - S-12). However, in May of 2001, at least two investors received

1 Agreements that stated the investor was to provide funds for HOGAN. (H.T. p. 27:19 – p. 28:6)
2 (H.T. p. 29:3 – 7) (Exhibits S-5 and S-13).

3 Also in May of 2001, HOGAN utilized a different document, “Investment Funding Terms
4 and Agreement,” (“Funding Terms Agreement”) to evidence the investment. (Exhibit S-23). The
5 Funding Terms Agreement stated that the amount invested would be repaid either from “the second
6 phase of investors” or “commissions received by Ted Hogan for his consulting services of the
7 Crow Tribal Council.” (Exhibit S-23). HOGAN was the personal guarantor on the Funding Terms
8 Agreement. (Exhibit S-23).

9 In 2002, HOGAN & ASSOCIATES and HOGAN represented to at least one investor that
10 the development project on the Crow Indian Reservation was “bonded and guaranteed by the
11 Federal government.” (H.T. p. 49:8 – 22). In 2003 and 2004, HOGAN & ASSOCIATES and
12 HOGAN represented to investors that there was a time limit on the investment opportunity and
13 they must hurry if they wanted to invest in the program. (H.T. p. 48:7 – 17). In early 2005,
14 HOGAN & ASSOCIATES and HOGAN represented to at least one investor that he was the only
15 investor in the program. (H.T. p. 48:23 – p. 50: 7).

16 In 2003, HOGAN & ASSOCIATES and HOGAN represented to an investor that the
17 drilling was about to start on the Tribal lands. In 2004, HOGAN & ASSOCIATES and HOGAN
18 stated to one investor that the drilling would start in about two weeks. In 2005, HOGAN &
19 ASSOCIATES and HOGAN told an investor that production drilling had started. (H.T. p. 48:18 –
20 p. 49:1). No drilling had started on the Crow Indian Reservation. (H.T. p. 53:20 – p. 54:1).
21 Furthermore, neither HOGAN & ASSOCIATES nor HOGAN had permission to drill on the Crow
22 Indian Reservation. (H.T. p. 54:2 – p. 55:1).

23 HOGAN & ASSOCIATES and HOGAN raised \$2,319,310 from 32 investors. (Exhibit S-
24 14). Although HOGAN & ASSOCIATES and HOGAN have been raising money from investors
25 to develop the resources of the Crow Indian Reservation since at least 2001 using at least two
26 different agreements, none of the investors have received the return of their principal or received

1 the expected returns pursuant to the terms of the Agreements. (H.T. p. 55:2 – 7)(Exhibits S-5 - S-
2 13).

3 **V. THE INTEREST IN COMMISSIONS AGREEMENTS ARE SECURITIES IN THE**
4 **FORM OF INVESTMENT CONTRACTS AND/OR PROFIT SHARING AGREEMENTS.**

5 **1. The Interest in Commission Agreements are Securities.**

6 **A. Investment Contract**

7 Investment contracts are included in the definition of securities. A.R.S. § 44-
8 1801(26)(“Security means . . . investment contract . . .”). The core definition of an investment
9 contract was set forth in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946). Under the *Howey* test, an
10 investment contract exists if it involves (1) an investment of money or other consideration; (2) in a
11 common enterprise; and (3) with the expectation of profits earned solely from the efforts of
12 others.²

13 Arizona courts and the Commission have adopted the *Howey* test as the basis for
14 investment contract analysis. Citing *Howey*, Arizona courts agree that the definition of securities
15 including investment contracts embody “a flexible rather than static principle, one that is capable
16 of adaptation to meet the countless and variable schemes devised by those who seek to use the
17 money of others on the promise of profits.” *Nutek Information Systems, Inc. v. Arizona*
18 *Corporation Commission*, 194 Ariz. 104, 108, 977 P.2d 826 (App. 1998); *Rose v. Dobras*, 128
19 Ariz. 209, 211, 624 P.2d 887 (App. 1981). In accordance with this view, Arizona courts have
20 developed flexible interpretations for each of the three prongs set forth in *Howey*.

21 HOGAN & ASSOCIATES and HOGAN sought the investment of money from investors.
22 The Agreements required investors to deliver to HOGAN “in the form of any legal tender or bank
23 draft” the agreed upon investment amount. (H.T. p.65:21 – 23)(H.T. p.132:7 – 8) (Exhibits S-5 -
24 S-13, S-15, S-16, S-23 and S-24). HOGAN & ASSOCIATES and HOGAN raised over \$2 million
25 from 32 investors. (Exhibit S-14). The first element of *Howey* was satisfied.

26 ² The *Howey* case originally used the phrase “solely from the efforts of others,” however, this language was later
modified to “substantially” in *SEC v. Glenn W. Turner Enterprises*, 474 F.2d 476, 482 (9th Cir. 1973).

1 With respect to the second element of *Howey*, “[t]wo tests have been developed to
2 determine the existence of a common enterprise in order to satisfy the second prong of the *Howey*
3 test: (1) the horizontal commonality test and (2) the vertical commonality test.” *Daggert v. Jackie*
4 *Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142 (App. 1986). Arizona courts have held that
5 commonality will be satisfied if either horizontal or vertical commonality can be shown. *Id.* at
6 566.

7 Horizontal commonality requires a pooling of investor funds collectively managed by a
8 promoter or third party. *Id.* at 565. HOGAN deposited Investor funds into one account³ managed
9 by HOGAN & ASSOCIATES and HOGAN. **(Exhibits S- 15 and S-24).**

10 To establish vertical form of commonality, a positive correlation between the potential
11 profits of the investor and the potential profits of the promoter need only be demonstrated. *Id.* at
12 566. The investors were to receive a percentage of commissions that HOGAN & ASSOCIATES
13 and HOGAN were to earn. **(H.T. p.29:3 – 12)(H.T. p.125:25 – P. 126:1 - 6)(Exhibits S-5 - S-13**
14 **and S-23).** This was set forth in the Agreements HOGAN signed. **(Exhibits S-5 - S-13 and S-23).**
15 Without HOGAN’s ability to earn commissions, the investors would not receive a return.
16 Therefore, the investors’ success was tied directly to HOGAN’s ability to earn commissions. **(H.T.**
17 **p.65:13 – 20)(Exhibits S-5 - S-13 and S-23).** This prong of the *Howey* test is satisfied.

18 In order to satisfy the third *Howey* prong in Arizona, one must only establish that the
19 efforts made by those other than the investors were the undeniably significant ones, and were those
20 essential managerial efforts that affected the failure or success of the enterprise. *Nutek*, 194 Ariz.
21 at 108. According to the Agreements provided to the investors, HOGAN has the exclusive agency
22 agreement to receive commissions, consulting fees, royalties, and like compensation for his
23 activities.” **(Exhibits S-5 - S-13 and S-23).** Further, the Agreements state that HOGAN is to
24 “coordinate a significant financial undertaking for the mineral exploration and development of
25 resources . . . on the Crow Indian Reservation.” **(Exhibits S-5 - S-13 and S-23).** Moreover, some

26 ³ Between 2001 and 2005, the bank account name changed but the account number remained the same. **(Exhibit S-16).**

1 the Agreements state that HOGAN is “responsible for insuring that acknowledgment and
2 commitment for the Commissions are properly included in any documents and agreements
3 between the Tribe and Companies. . .” (Exhibits S-6, S-7, S-8, S-9, and S-10). The Agreements
4 state “[t]he investor shall not have any interest or ownership in Hogan and Associates, nor shall the
5 Investor participate in the management of Hogan and Associates.” (Exhibits S-6 - S-9). Although
6 some of the Agreements were different, the investors had no other obligation except the investment
7 of money. (H.T. p.65:22 – p.55:1)(H.T. p.130:16 – 19). Therefore, efforts of HOGAN &
8 ASSOCIATES and HOGAN affect the success or failure of the investment satisfying the final
9 prong of the *Howey* test.

10 **B. Profit Sharing Agreements**

11 Courts have made no real distinction between an investment contract and a certificate of
12 interest or participation in a profit-sharing agreement. *Hirk v. Agri-Research Council, Inc.*, 561
13 F.2d 96, 102 (1977). Courts have used the terms investment contract and certificate of interest or
14 participation in a profit-sharing agreement interchangeably. See, e.g., *SEC v. Latta*, 250 F. Supp.
15 170 (N. D. Cal.), *aff'd per curiam*, 356 F. 2d 103 (9th Cir. 1965), *cert. denied*, 384 U. S. 940
16 (1966)(contracts to assign undivided distributive shares in a decedent's estate in event of recovery);
17 *SEC v. Bill Willoughby Coin Exchange*, CCH FED. SEC. L. REP. P 91,355 (S. D. Cal. 1964)(coin
18 investment program where funds of investors are pooled and used in purchase and sale of coins);
19 *SEC v. Addison*, 194 F. Supp. 709 (N. D. Texas 1961)(loan notes entitling the lenders to interests in
20 mining and other operations); *SEC v. Tung Corp.*, 32 F. Supp. 371 (N. D. Ill. 1940)(contracts
21 selling forested lands with lease back agreement requiring seller to care for trees at fixed annual
22 charges).

23 Since investment contract and certificate of interest or participation in a profit-sharing
24 agreement are interchangeable, the analysis for the Agreements offered and sold by the HOGAN &
25 ASSOCIATES and HOGAN would be the same as the analysis for investment contracts. The
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1 Agreements meet the requirements of an investment contract and are therefore securities under the
2 Act.

3 The Agreements offered by HOGAN & ASSOCIATES and HOGAN satisfy all three
4 elements of the Howey test. Therefore, the Agreements offered by HOGAN & ASSOCIATES and
5 HOGAN, are securities in the form of certificates of interest or participation in profit-sharing
6 agreements.

7 **2. The Securities Offered by Hogan & Associates and Hogan Are Required To Be**
8 **Registered.**

9 Under the Act, it is unlawful to sell or offer for sale any securities unless the securities are
10 registered or unless there is an applicable exemption from registration. A.R.S. §44-1841. The facts
11 above indicate that HOGAN & ASSOCIATES and HOGAN offered securities in the form of
12 investment contracts and/or certificate of interest or participation in a profit-sharing agreement.
13 The securities were not registered or exempt from registration. **(Exhibit S-2)**. Furthermore,
14 HOGAN & ASSOCIATES and HOGAN were not registered as dealers or salesmen (or exempt
15 from registration) as required under the Act. A.R.S. §44-1842. **(Exhibits S-2 and S-3)**.

16 **3. The Burden Is On The Person Claiming an Exemption To Prove It Is Applicable.**

17 Pursuant to A.R.S. §44-2033, in any action, when a defense is based upon any exemption
18 under the Act, the burden of proving the exemption exists shall be upon the party raising the
19 defense. "The general rule governing the burden of proof in Arizona is that a party who asserts the
20 affirmative of an issue has the burden of proving it." *Black, Robertshaw, Frederick, Copple &*
21 *Wright, P.C. v. U.S.*, 130 Ariz. 110, 634 P.2d 398 (App. 1981) quoting *Harvey v. Aubrey*, 53 Ariz.
22 210, 213, 87 P.2d 482, 483 (1939). In any action, civil or criminal, the burden of proving the
23 applicability of an exemption from registration under the Act falls upon the party raising such a
24 defense. A.R.S. §44-2033. *See also, State v. Barber*, 133 Ariz. 572, 578, 653 P.2d 29 (App.
25 1982).

1 HOGAN & ASSOCIATES and HOGAN asserted in pleadings filed that they did not
2 violate the Act; however, they presented no evidence to support that position. HOGAN &
3 ASSOCIATES and HOGAN stated in previous pleadings that they did not offer investments but
4 they received "loans." (**Hogan's Motion to Dismiss filed on June 8, 2010, page 2**). However
5 calling the funds from investors "loans" mischaracterizes the transactions. According to
6 DAMITIO's own words to an investor, "[y]ou invested in Ted's plan. . . ." (**Exhibit S-19**).
7 According to the "Investment Funding Terms and Agreement" document signed by HOGAN as
8 the "Recipient-Guarantor" the other parties are characterized as Investors. (**Exhibit S-23**). In
9 emails between HOGAN and witness Melissa Deegan, HOGAN stated, "[y]ou people made an
10 investment" (**Exhibit S-26**). In the same email, HOGAN stated, "investments are investments
11 not loans." (**Exhibit S-26**). In a different email to witness Deegan, HOGAN stated, "[y]ou are an
12 investor, and only an investor." (**Exhibit S-27**). At all times, witness Melissa Deegan believed she
13 and her family had made an investment with Respondents and expected a return. (**H.T. p. 150:17 –**
14 **19**).

15 HOGAN & ASSOCIATES and HOGAN had the opportunity to provide testimony, call
16 witnesses and present evidence to support their claims that they did not violate the Act. HOGAN &
17 ASSOCIATES and HOGAN chose to attend the requested hearing but did not participate in the
18 hearing. By failing to elicit testimony and present evidence, HOGAN & ASSOCIATES and
19 HOGAN have failed to overcome the burden necessary to establish whether they had an exemption
20 available.

21 **4. Hogan & Associates and Hogan violated the Anti-Fraud provisions of the Arizona**
22 **Securities Act.**

23 Under A.R.S. § 44-1991, it is a fraudulent practice and unlawful for a person, in connection
24 with a transaction or transactions within or from this state involving an offer to sell or buy
25 securities, or a sale or purchase of securities, to directly or indirectly do any of the following: (1)
26 employ any device, scheme or artifice to defraud; (2) make untrue statements of material fact, or

1 omit to state any material fact necessary in order to make the statements made, in the light of the
2 circumstances in which they were made, not misleading; or (3) engage in any transaction, practice
3 or course of business which operates or would operate as a fraud or deceit. A.R.S. § 44-1991(A).
4 Securities fraud may be proven by any one of these acts. *Hernandez v. Superior Court*, 179 Ariz.
5 515, 880 P.2d 735 (App. 1994).

6 In the context of these provisions, “materiality” requires a showing of substantial likelihood
7 that, under all the circumstances, the misstated or omitted fact would have assumed actual significance
8 in the deliberations of a reasonable buyer. *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553,
9 733 P.2d 1131 (1986); citing *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (App. 1981),
10 quoting *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976).
11 Under this objective test, there is no need to investigate whether an omission or misstatement was
12 actually significant to a particular buyer. Additionally, the affirmative duty not to mislead potential
13 investors in any way places a heavy burden on the offeror and removes the burden of investigation
14 from the investor. *Trimble*, 152 Ariz. at 553. A misrepresentation or omission of a material fact in the
15 offer and sale of a security is actionable even though it may be unintended or the falsity or misleading
16 character of the statement may be unknown. In other words, scienter or guilty knowledge is not an
17 element of a violation of A.R.S. § 44-1991(A)(2). See e.g., *State v. Gunnison*, 127 Ariz. 110, 113, 618
18 P.2d 604 (1980). Stated differently, a seller of securities is strictly liable for any of the
19 misrepresentations or omissions he makes. *Rose v. Dobras*, 128 Ariz. at 214. Additionally, there is
20 no requirement to show that investors relied on the misrepresentations or omissions, *Rose*, 128 Ariz. at
21 214, or that the misrepresentations or omissions caused injury to the investors. *Trimble*, 152 Ariz. at
22 553. “Plaintiffs’ burden of proof requires only that they demonstrate that the statements were material
23 and misleading.” *Aaron v. Fromkin*, 196 Ariz. 224, 227, 314 P.2d 1039, 1042 (App. 2000).

24 A primary violation of A.R.S. § 44-1991 can be either direct or indirect. It is now well settled
25 in Arizona that *indirectly* violating A.R.S. § 44-1991 is not to be narrowly interpreted. *Barnes v.*
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1 *Vozack*, 113 Ariz. 269, 550 P.2d 1070 (1976)(Officers of company could be liable under A.R.S. § 44-
2 1991 for the fraudulent statements of a salesman of the security.)

3 Respondents have violated A.R.S. §44-1991 by:

4 a) HOGAN & ASSOCIATES and HOGAN misrepresenting to some offerees
5 and investors that they were the only investors in the program when in fact there were many investors.
6 (H.T. p. 48:23 – p. 50: 7).

7 b) HOGAN & ASSOCIATES and HOGAN misrepresenting to some offerees
8 and investors work had already begun on the Crow Indian Reservation, the project was near
9 completion or that the project was moving forward with various work being completed, when, in fact,
10 the project had not begun. (H.T. p. 48:18 – p. 49:1)(H.T. p. 53:20 – p. 54:1)(H.T. p. 54:2 – p. 55:1).

11 c) HOGAN & ASSOCIATES and HOGAN misrepresenting to at least one
12 investor that the development project on the Crow Indian Reservation was “bonded and guaranteed by
13 the Federal government” when, in fact, the project was not. (H.T. p. 49:8 – 22).

14 d) HOGAN & ASSOCIATES and HOGAN failing to disclose to offerees and
15 investors that no investors have received a return of their principal or the expected returns as
16 represented under the Agreements signed by HOGAN & ASSOCIATES or HOGAN. (H.T. p. 55:2 –
17 7).

18 Any *one* of these actions would violate the Act. Taken together, they show HOGAN &
19 ASSOCIATES and HOGAN violated the Act and a cease and desist order should be issued to prevent
20 further harm to the investing public.

21 **V. HEARSAY IS ADMISSIBLE IN AN ADMINISTRATIVE PROCEEDING**

22 Pursuant to statute, an administrative hearing may be conducted in an informal manner and
23 without adherence to the rules of evidence required in judicial proceedings. *See* A.R.S. §41-
24 1062(A)(1). The statute further states “[n]either the manner of conducting the hearing nor the
25 failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for
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1 reversing any administrative decision or order providing the evidence supporting such decision or
2 order is substantial, reliable, and probative.” See A.R.S. §41-1062(A)(1).

3 “It is clear in Arizona that hearsay is admissible in administrative proceedings, and that it
4 may, in proper circumstances, be given probative weight.” *Begay v. Department of Economic Sec.*,
5 128 Ariz. 407, 409, 626 P.2d 137, 139 (App. 1981). In *Wiesler v. Prins*, 167 Ariz. 223, 227, 805
6 P.2d 1044, 1048 (App. 1990), the court held that the general rule that “reliable hearsay is
7 admissible in administrative proceedings and may even be the only support for an administrative
8 decision.” Hearsay evidence is considered reliable where the circumstances tend to establish that
9 the evidence offered is trustworthy. *Reynolds Metals Co. v. Industrial Commission*, 98 Ariz. 97,
10 102, 402 P. 2d 414, 417 (1965). The courts look to the information provided regarding the
11 speaker, the speaker’s knowledge, and the source of information to determine if the testimony is
12 reliable and trustworthy. Hearsay would be considered unreliable “when the speaker is not
13 identified, when no foundation for the speaker’s knowledge is given, or when the place, date, and
14 time, and identity of others present is unknown or not disclosed.” *Plowman v. State Liquor Bd.*,
15 152 Ariz. 331, 337, 732 P.2d 222, 228 (App. 1986).

16 In this case, the Division called as a witness Joseph Waller, Resident Agent in Charge of
17 the Office of Inspector General for the Montana field office and assigned to the U.S. Department
18 of the Interior, who headed an investigation into the activities of HOGAN and HOGAN &
19 ASSOCIATES. Agent Waller testified that he reviewed bank records and interviewed witnesses.
20 In addition, Ron Baran, Special Investigator for the Division, testified as to his investigation of the
21 HOGAN & ASSOCIATES and HOGAN. Agent Waller and Special Investigator Baran testified as
22 to the conversations they personally had with investors and the records they received directly from
23 investors and through the service of subpoenas. The remaining witnesses were direct investors
24 with the HOGAN & ASSOCIATES and HOGAN and had direct conversations with HOGAN. Ms.
25 Deegan and her family invested with the HOGAN & ASSOCIATES and HOGAN and she was
26

1 present when her family invested and is knowledgeable regarding the investments made by her
2 family.

3 The testimony by Agent Waller and Special Investigator Baran is reliable and relevant
4 testimony because their conversation with investors as well as reviewing the documents they
5 received as part of their independent investigations. Therefore, hearsay should be admitted.

6 VI. CONTROL PERSON

7 The language of A.R.S. § 44-1999(B) imposes liability on a “person who, directly or
8 indirectly, controls any person liable for a violation of § 44-1991 or 44-1992 is liable jointly and
9 severally with and to the same extent as the controlled person.” It does not require actual
10 participation in the securities violations.

11 The Court in *Eastern Vanguard Forex v Arizona Corporation Commission*, 206, Ariz. 399,
12 412, 79 P.3d 86, 99 (App. 2003), found that “to satisfy the first prong of § 44-1999(B), the
13 evidence need only show that the person targeted as a controlling person had the legal power,
14 either individually or as part of a control group, to control the activities of the primary violator.”
15 Further, the Court found that “liability may be premised on the power to control and does not
16 require actual participation in the wrongful conduct.” *Id.* at 100.

17 At hearing, the Division presented evidence that both DAMITIO and HOGAN participated
18 in and controlled HOGAN & ASSOCIATES. The evidence presented at hearing included the
19 *Minutes of First Meeting of Members of Theodore J. Hogan and Associates LLC* (“Minutes”) dated
20 August 5, 2002 stating that HOGAN was the “Managing Member, and Chief Executive Officer”
21 and DAMITIO was the “Vice-Managing Member.” (H.T. p.92:17 – 20)(Exhibits S-17
22 ACC001744-45 and S-21). According to the Minutes, HOGAN was authorized to “conduct day to
23 day business” of HOGAN & ASSOCIATES. (Exhibits S-17 ACC001744-45 and S-21). The
24 Minutes further stated that DAMITIO “is authorized to preside at the Meeting of the Members of
25 Theodore J. Hogan and Associates LLC and to perform any and all other duties as assigned by the
26 Managing Members/CEO.” (Exhibits S-17 ACC001744-45 and S-21).

1 DAMITIO identified herself as a control person for HOGAN & ASSOCIATES. She signed
2 and submitted applications to obtain residential mortgages where she stated that she was "Vice-
3 president" and/or "owner/vp" of HOGAN & ASSOCIATES. **(Exhibits S-17 and S-18)**. In one
4 application, DAMITIO stated that she was been employed with HOGAN & ASSOCIATES for
5 seven years. **(Exhibit S-17 ACC001109)**. In a subsequent application, DAMITIO stated that she
6 was employed with HOGAN & ASSOCIATES for nine years. **(Exhibit S-18 ACC002139)**. In
7 fact, DAMITIO even disclosed her monthly salary from her employment at HOGAN &
8 ASSOCIATES. **(Exhibits S-17 and S-18)**. DAMITIO listed no other employers on her
9 applications. **(Exhibits S-17 and S-18)**. DAMITIO received money from HOGAN &
10 ASSOCIATES and its predecessor company starting in 2001 through at least 2005 totaling well
11 over \$774,000. **(H.T. p.43:1 – 5; p.43: 22 – p.44:7)(Exhibit S-16)**.

12 Both mortgage companies conducted employment verification on DAMITIO's application.
13 **(Exhibit S-17 ACC001113 and ACC001742 and Exhibit S-18 ACC002146)**. On December 17,
14 2004, a certified public accountant for HOGAN & ASSOCIATES provided a letter to the mortgage
15 company stating that DAMITIO is a fifty percent owner of HOGAN & ASSOCIATES. **(H.T.**
16 **p.96:12 – 15)(Exhibit S-17 ACC001743)**.

17 Investors contacted DAMITIO, in some instances prior to their investment, for information
18 related to the investment. **(Exhibits S-19 and S-20)**. DAMITIO admitted to being involved with
19 the investment project for many years. **(Exhibit S-19)**.

20 Both HOGAN and DAMITIO directly or indirectly controlled HOGAN & ASSOCIATES.
21 Both HOGAN and DAMITIO, as control persons, are liable to the same extent as HOGAN &
22 ASSOCIATES for violations of the Act.

23 VII. CONCLUSION

24 The evidence presented at the hearing establishes that HOGAN & ASSOCIATES, HOGAN
25 and DAMITIO, while not being registered as securities dealers or salesperson, offered unregistered
26 securities, in the form of investment contracts and/or certificate of interest or participation in a profit

1 sharing agreement, within or from Arizona, to prospective Arizona investors. The testimony and
2 evidence show that neither the securities nor the HOGAN & ASSOCIATES and HOGAN qualified
3 for exemptions. Further, the evidence presented at hearing also establishes that HOGAN &
4 ASSOCIATES, HOGAN and DAMITIO violated the anti-fraud provisions of the Act.

5 Based upon the evidence presented, the Division respectfully requests this tribunal to:

6 A. Order HOGAN & ASSOCIATES, HOGAN and DAMITIO to cease and desist from further
7 violations of the Act pursuant to A.R.S. §44-2032;

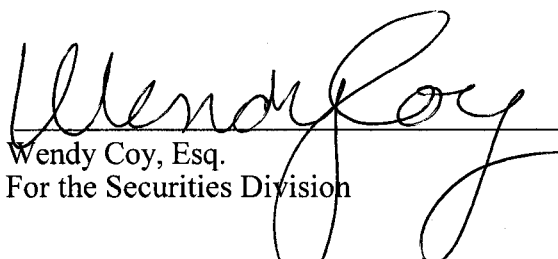
8 B. Order HOGAN & ASSOCIATES, HOGAN and DAMITIO to pay an administrative
9 penalty of not less than \$160,000⁴ pursuant to A.R.S. §44-2036(A);

10 C. Order HOGAN & ASSOCIATES, HOGAN and DAMITIO to pay restitution of not less
11 than \$2,319,310.00 pursuant to A.R.S. §44-2032;

12 D. Order that HOGAN and DAMITIO acted for the benefit of their marital community and,
13 pursuant to A.R.S. §§ 25-214 and 25-215, this Order of restitution and administrative penalties is a
14 debt of the community; and

15 E. Order any other relief this tribunal deems appropriate or just.

16 Dated this 17th day of September, 2010.

17
18 
19 Wendy Coy, Esq.
20 For the Securities Division
21
22
23
24

25
26 ⁴ Pursuant to A.R.S. §44-2036(A), the Commission is authorized to order administrative penalties in an amount not to exceed \$5,000 per violation. The Securities Division alleges violations of A.R.S. §§ 44-1841, 44-1842 and 1991. The Securities Division only seeks administrative penalty of \$5,000 for each of the 32 investors totaling \$160,000.

1 ORIGINAL AND THIRTEEN (13) COPIES
2 of the foregoing filed this
3 17th day of September, 2010, with:

4 Docket Control
5 Arizona Corporation Commission
6 1200 West Washington
7 Phoenix, AZ 85007

8 COPY of the foregoing hand-delivered this
9 17th day of September, 2010 to:

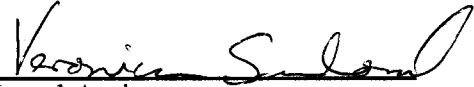
10 Administrative Law Judge Marc Stern
11 Arizona Corporation Commission/Hearing Division
12 1200 West Washington
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed this
15 17th day of September, 2010 to:

16 Theodore J. Hogan & Associates, LLC
17 460 Andante
18 Sedona, Arizona 86336

19 Theodore J. Hogan
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21 Sedona, Arizona 86336

22 Christina L. Damitio
23 460 Andante
24 Sedona, Arizona 86336

25 By: 
26 Legal Assistant